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IN THE

Supreme Court of The United States

OCTOBER TERM, 1971

No. . . . . Misc. 71 - 5478

ISAIAS LARA,
PETITIONER

VS.

THE STATE OF TEXAS,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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OCTOBER TERM, 1971

No. . . . . Misc.

ISAIAS LARA,
PETITIONER

VS.

THE STATE OF TEXAS,
RESPONDENT

MOTION FOR LEAVE TO PROCEED INFORMA PAUPERIS

Petitioner, Isaias Lara, asks leave to file the attached Petition for a Writ of Certiorari to the Court of Criminal Appeals for the State of Texas without prepayment of costs and to proceed informa pauperis. The Petitioner's affidavit in support of this motion is attached hereto.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED INFORMA PAUPERIS

I, Isaias Lara, being first duly sworn according to law, depose and say, in support of my application for leave to proceed without prepayment of costs and to proceed informa pauperis:

1. I am the Petitioner in the above entitled cause.
2. Because of my poverty, I am unable to pay the costs of said cause.
3. I am unable to give security for the same.
4. That I believe that I am entitled to the redress I seek in this cause.
5. The nature of said cause is briefly stated as follows:

I was found guilty by a jury of the offense of possession of one capsule of heroin, and after a hearing, my punishment was assessed at life in the Texas Department of Corrections. I gave notice of appeal in the Trial Court, and my case was heard by the Texas Court of Criminal Appeals. The lower Court judgment was affirmed by the Texas Court of Criminal Appeals without dissent. The present proceeding is based on the fact that I was arrested in Bexar County, Texas, upon a public street about 4:30 in the afternoon without a warrant, handcuffed to a stop sign, searched and at a later time moved from the stop sign and searched a second time, at which time the officers claim to have seen a capsule of heroin fall from my pocket. As a result of this second search, incriminating evidence was obtained, and the evidence was admitted into evidence in the Trial

Court in violation of the below enumerated constitutional right.

Isaias Lara

Isaias Lara

SUBSCRIBED AND SWORN to before me, the undersigned authority, by Isaias Lara, this 21st day of September, 1971

SANDRA DELGADO
Notary Public, Bexar County, Texas

Sandra Delgado

Notary Public in and for
Bexar County, Texas.

THE STATE OF TEXAS }
COUNTY OF BEXAR }

BEFORE ME, the undersigned authority, personally appeared Isaias Lara, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 21st day of September, 1971

SANDRA DELGADO
Notary Public, Bexar County, Texas

Sandra Delgado

Notary Public in and for
Bexar County, Texas.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1971

No. . . . . Misc.

ISAIAS LARA,
PETITIONER
VS.
THE STATE OF TEXAS,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas entered in the above entitled case based on the Court's opinion on March 17, 1971, and the Court's opinion on Appellant's Motion for Re-Hearing handed down May 19, 1971, and which said judgment became final by the denial of Appellant's Second Motion for Re-Hearing without written opinion on June 29, 1971.

CITATION TO OPINIONS BELOW

The opinions of the Court of Criminal Appeals are reported in 469 S.W. 2d 177, and they are opinions in Number 43511, handed down March 17, 1971, and May 19, 1971, and are appended hereto as Appendix A and Appendix B.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on March 17, 1971.

The Court handed down a second opinion on May 19, 1971, and a Second Motion for Re-Hearing was overruled without written opinion on June 29, 1971, and the judgment became final on that date. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, FOURTH AMENDMENT:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

"R" represents the record on file in the Texas Court of Criminal Appeals. "SF" represents the cer-

tified copy of the Statement of Facts which accompanies this application. Wherever possible both page numbers will be given.

The offense is possession of one capsule of heroin in violation of Article 725b Vernon's Annotated Penal Code, and the punishment was assessed at life imprisonment — the maximum sentence provided by statute.

On November 4, 1968, Petitioner, Isaias Lara, was arrested by officers of the San Antonio Police Department in the 500 block of Matamoras Street in San Antonio, Bexar County, Texas (R 154, SF 93). The arrest occurred at approximately 4:30 o'clock in the afternoon, when Officer P. R. Gonzales, who happened to be passing by the area, observed a parked car with the motor running and a person coming from the area of some vacant shacks (R 154, SF 93). Officer Gonzales stopped the person, obtained identification and released this individual (R 155, SF 94). Officer Gonzales then called for assistance because he noticed still another individual north of where the officer stood in the street (R 155, SF 94). Upon the arrival of Officer Johnny Teran, the two officers proceeded toward the shacks, and someone yelled something, and when the officers got to the shack, they saw five or six persons running in different directions (R 156, SF 95). Officer Teran began to chase Petitioner, Isaias Lara, and caught Petitioner, Isaias Lara, in about one-half of a block (R 204, SF 142). At this time, Officer Teran conducted a search for weapons and found a pocket knife which the officer kept (R 205, SF 143). Officer Teran then handcuffed Petitioner to a stop sign, and began to chase one Joe Alaniz, whom he caught another block away (R 205, SF 143).

Meanwhile, Officer Gonzales apprehended a third person and returned him to the corner where Petitioner was handcuffed to the stop sign, and Officer Teran also returned with Joe Alaniz to the same location (R 158, 159, 206, SF 97, 98, 144). The officers then placed Petitioner, Isaias Lara, in a patrol car along with the two other individuals arrested and moved them back to where they had been first observed (R 206, SF 144). Officer Gonzales then conducted a second search which included inspection of Petitioner's socks, cuffs, around his waist and the turning inside out of Petitioner's pockets (R 162, SF 101). A small capsule fell out of Petitioner's right pants pocket when Officer Gonzales turned that pocket inside out (R 162, SF 101). The capsule contained three hundredths of a gram of heroin (R 201, SF 139).

Both officers testified that in their opinion the Petitioner, Isaias Lara, was under the influence of a narcotic drug at the time of his arrest although Officer Gonzales never observed the Petitioner until he saw him handcuffed to the stop sign, and Officer Teran never really had a chance to observe the Petitioner until he returned to the place where Petitioner was restrained (R 53, R 44).

The Officers possessed no warrant of arrest for anyone at the location nor did they have a search warrant for any of the shacks in the immediate area (R 212, SF 150). The officers testified that they had received reports and made arrests near this location on other occasions for vagrancy and disturbances of the peace (R 218, SF 156). The officers further stated that no breach of the peace was committed in their presence

(R 219, SF 157). The officers also said that their suspicions were aroused when the subjects ran and that it was necessary to investigate further what had actually been going on in the vacant house (R 55, 181, 216, SF 94, 154). Petitioner, Isaias Lara, according to Officer Teran, was being held for investigation, and during hearing for Motion to Suppress, the officer stated that Petitioner was arrested because he ran (R 221, SF 59, R 46). The record also reflects that the knife found in Petitioner's possession was not prohibited by Texas law (R 217, SF 155).

Petitioner's court-appointed counsel filed a motion to suppress evidence which was heard before the trial and overruled (R 16, 20). The same motion to suppress was again presented to the Trial Judge along with a certified transcript of the evidence adduced, and the same motion was again overruled and denied (R 20). Petitioner's court-appointed counsel made numerous objections to the evidence during the course of the trial on the merits.

ISSUES PRESENTED

PETITIONER CONTENDS THAT THE ARREST MADE WAS WITHOUT PROBABLE CAUSE IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

PETITIONER CONTENDS THAT THE PROBABLE CAUSE, IF ANY, CEASED TO EXIST AFTER THE SEARCH FOR WEAPONS AND WAS AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

PETITIONER'S APPEAL

In the Court of Criminal Appeals, Petitioner presented the issues basically as are hereinabove stated. The Texas Court of Criminal Appeals cites as authority for this arrest Article 14.03 Vernon's Annotated Code of Criminal Procedure, which provides:

> "Any peace officer may arrest, without warrant, persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."

Petitioner has consistently relied upon the holdings of this Honorable Court in **Terry vs. Ohio,** 1968, 392 U. S. 1; 88 S. Ct. 1868; 20 L Ed 2d 889, and **Sibron vs. New York,** 1968, 392 U. S. 40; 88 S. Ct. 1889; 20 L Ed 2d 917. In connection with the above, Petitioner does not attack the constitutionality of Article 14.03 Vernon's Annotated Code of Criminal Procedure, but would ask this Court to concentrate on whether the arrest of this Petitioner, and the search and seizure, were reasonable. It is contended on behalf of the Petitioner that the facts of this record indicate that the officers from the very inception of their contact with Petitioner intended to make a minute and thorough search of his person. It is further contended that under the decisions of this Court in **Carroll vs. United States,** 1925, 267 U. S. 132; 45 S. Ct. 280; 69 L Ed 543; **Brinegar vs. United States,** 1949, 338 U. S. 160; 69 S. Ct. 1302; 93 L Ed 1879; **Beck vs. Ohio,** 1964, 379 U. S. 89; 85 S. Ct. 223; 13 L Ed 2d 142; **Henry vs. United States,** 1959, 361 U. S. 253; 80 S. Ct. 168; 4 L Ed 2d 134; **Johnson vs. United States,** 1948, 333 U. S.

10; 68 S. Ct. 367; 92 L Ed 436; **Jones vs. United States,** 1960, 362 U. S. 257; 80 S. Ct. 725; 4 L Ed 2d 697; **Recznik vs. City of Lorain,** 1968, 393 U. S. 166; 89 S. Ct. 342; 21 L Ed 2d 317; **Rios vs. United States,** 1960, 364 U. S. 253; 80 S. Ct. 1431; 4 L Ed 2d 134; **United States vs. DiRe,** 1949, 332 U. S. 581; 68 S. Ct. 222; 92 L Ed 210; and **Wong Sun vs. United States,** 1963, 371 U. S. 471; 83 S. Ct. 407; 9 L Ed 2d 441, that no probable cause existed for the arrest.

In examining the officers' conduct, it is submitted that the officers acted under circumstances amounting to less than the objective standard set forth by this Court in **Terry** (supra), wherein this Court said at 88 S. Ct. 1880, "would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable belief that the action taken was appropriate?" It is submitted that the type of search authorized by this Court in **Terry** (supra) was not to be allowed in the instant case because the crime evidently suspected by the officers was not a crime of violence.

In support of the above, the Court's attention is directed to Mr. Justice Harlan's concurring opinion in **Terry** (supra) in which he states at 88 S. Ct. 1886, "where such a stop is reasonable, however, the right to frisk must be immediate and automatic, the reason for the stop, is, as here, an articuable suspicion of a crime of violence". It is submitted that the crime suspected in the instant case was possession of heroin, which is not a crime of violence.

It would then naturally follow that this case falls within the rule announced by this Court in **Sibron**

(supra). It is further submitted that Article 14.03 of Vernon's Annotated Code of Criminal Procedre is nothing more than the Texas "stop and frisk law". The reason for the above being that there is no offense for which a person may be prosecuted in the State of Texas for being a suspicious person, because the statute involved is merely procedural in nature and an effort to define a probable cause standard.

Petitioner urges that the statute involved adopts a non-viable test of suspicion wherein the objective judicial scrutiny is easily misled.

In discussing the term suspicion, it is necessary to look at the actual facts in the officers' possession. The officers possessed some general information as to the use of the premises in question by narcotics addicts. They did not possess any specific information such as that possessed by the government agents in **Draper vs. United States,** 1959, 358 U. S. 307; 79 S. Ct. 329; 3 L Ed 2d 327. The officers were in the same position as the arresting officers in **DiRe** (supra) because they had no specific information concerning Petitioner, Isaias Lara.

Both officers had been at the scene for some period of time before they observed the Petitioner, Isaias Lara. The record is silent as to whether or not the officers actually saw Petitioner run from within the suspected premises. Officer Teran stated in the testimony on motion to suppress evidence that the first time he saw Petitioner, he was running (R 41). Petitioner would submit that the only real suspicious or near suspicious act on the part of Petitioner was walking at a fast pace or running (R 41). The Court said in **Wong Sun** (supra) at 83 S. Ct. 415, in footnote 10:

> "We have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime."

The Court also discusses in the same footnote as above the question of whether or not flight alone is sufficient cause for an arrest and rejects same quoting from **Alberty vs. United States,** 1896, 162 U.S. 499; 16 S. Ct. 864; 40 L Ed 1051. At 16 S. Ct. 868, the Court stated:

> "It is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of the crime through fear of being apprehended as the guilty party or from an unwillingness to appear as witnesses."

This Court has held that the slamming of a door when officers announced they were police was an ambiguous circumstance and insufficient to establish probable cause for an arrest and search. **Miller vs. United States,** 1958, 357 U.S. 301; 78 S. Ct. 1190; 2 L Ed 2d 1332.

If one were placed in a position such as your Petitioner, being an ex-convict, and being in a proximity of a suspicioned or suspected premises, he certainly may have panicked in the belief that he would most certainly be arrested for something. It must further be pointed out that the record is silent as to when Petitioner first had knowledge of the officers' presence. It is certainly possible, if not probable, that he had started to walk fast or run prior to even knowing of the officers' presence. The record is also silent as to whether or not the officers announced their presence.

Thus it is contended that this case falls within the area where the Court has r e l i e d simply on a

police evaluation to protect a right of privacy. This is in violation of the Fourth Amendment that Petitioner would urge.

> "The right to privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals,"

McDonald vs. United States, 1948, 335 U.S. 451, 455; 69 S. Ct. 191, 193; 93 L Ed 153.

In **Sibron** (supra), this Court said at 88 S. Ct. 1904,

> "Even examining arguendo that there were adequate grounds to search Sibron for weapons, the nature and scope of the search conducted by Patrolman Martin were so clearly unrelated to the justification as to render the heroin inadmissible. The search for weapons approved in Terry consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in Terry place his hands in the pockets of the man he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony was that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception — the protection of the officer by disarming a potentially dangerous man. Such a search warrants the guaranty of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents."

It is this Petitioner's contention that the nature and scope of the search conducted by Officer Gonzales could in no way be construed as a search for weapons because Officer Teran had already made a search for weapons. It would appear that the only purpose Officer Gonzales could have had in making a second search was to explore the person of Petitioner for contraband.

This Court further said in **Sibron** (supra) concerning the companion case **Peters** at 88 S. Ct. 1904:

> "As the trial court explicitly recognized deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime there are probable factors to be considered in the decision to make an arrest."

It is Petitioner's contention that the officers observed no furtive action to be coupled with his flight and possessed no specific knowledge relating this suspect to the evidence of any crime that would justify the decision to make an arrest. It is also contended that the application by the Texas Court of Criminal Appeals of cases which involve an arrest for traffic violation do not apply in the instant situation. The Presiding Judge of the Texas Court of Criminal Appeals in his opinion on motion for re-hearing relies very strongly on the case of **Taylor vs. State,** 421 SW 2d 403; cert. den.; 393 U. S. 916, 89 S. Ct. 241; 11 L Ed 2d 201. Petitioner would respectfully show that the arrest in **Taylor** (supra) was made for a prosecutable violation of Article 6687b, Section 13, V.A.C.S.

and the determining of whether or not the automobile which bore an out of state registration was stolen. The difference between **Taylor** (supra) and the instant situation is that the officers discovered marihuana in the pursuance of an investigation initiated by an arrest for a prosecutable offense. The Court's opinion on motion for re-hearing in this case takes the position that the original arrest under Article 14.03 Vernon's Annotated Code of Criminal Procedure, which is not a prosecutable offense, justified not only a preliminary or cursory search for weapons, but when the officers observed that the Petitioner was, in the officers' opinion, under the influence of narcotics in violation of Article 725c Vernon's Annotated Penal Code, they had the right to conduct a second search because a felony had in effect been committed in their presence.

Petitioner would urge and the record reflects that the officers did not charge Petitioner with being under the influence of narcotics and further that neither of them had ever booked anyone for being under the influence of narcotics (R 56). It is further interesting to note that this Petitioner can find only one successful prosecution for being under the influence of narcotics under the annotations concerning said article in Vernon's Annotated Penal Code, and in the case observed the defendant entered a plea of guilty. **Salas vs. State,** 365 SW 2d 174; cert. dismissed; 375 U.S. 15; 84 S. Ct. 96; 11 L Ed 2d 45.

Petitioner takes the position that the only time the officers could have observed anything with any accuracy about his condition was after the pat-down search had been made, and Officer Teran returned

to the location where Petitioner was handcuffed to the stop sign. Petitioner further contends that from a reading of the record it appears that the officers noticed this condition only as an afterthought and in an attempt to justify Petitioner's arrest after they had found contraband as a result of the second search. The Texas Court of Criminals Appeals further takes the position that the second search at a different time and a different place from the location of the original apprehension of Petitioner is "substantially contemporaneous" to his initial arrest. Petitioner contends that the Texas Court of Criminal Appeals did not take into consideration the ruling announced by this Honorable Court in **Preston vs. United States,** 1964, 376 U.S. 364; 84 S. Ct. 881; 11 L Ed 2d 777. Like **Preston** (supra), it is contended that a search for weapons having been already made there was no further need to search Petitioner for any weapons.

REASON FOR GRANTING WRIT

A casual reading of the record in this case makes it apparent that the basic constitutional guaranty of the Fourth Amendment to the United States Constitution was not only violated by the police but that Petitioner has been unable to gain any relief in the Court of last resort in criminal matters in the State of Texas. The Texas Court of Criminal Appeals' decisions and opinions in this case allowed a police officer the unlimited right of search in a stop and frisk situation contrary to the above cited holdings of this Honorable Court.

It therefore becomes necessary for Petitioner to

beseech this Honorable Court for any relief to which he may be entitled.

Respectfully Submitted,

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San Antonio, Texas 78205

THEO P. HENLEY
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San Antonio, Texas 78205

CERTIFICATE OF SERVICE

I, HARRY A. NASS, JR., a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 23 day of September, 1971, I served a copy of the foregoing Writ of Certiorari on the Respondent by depositing same in the United States Post Office with postage prepaid addressed to the following counsel of record at his post office address, to-wit: Honorable Crawford C. Martin, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas.

Harry A. Nass, Jr.

APPENDIX A

NO. 43,511

ISAIAS LARA, Appellant
VS.
THE STATE OF TEXAS, Appellee

APPEAL FROM BEXAR COUNTY

OPINION

This is an appeal from a conviction for unlawful possession of a narcotic drug, to-wit: heroin; the punishment was assessed by a jury at life.

The sole ground of error urged by appellant is the legality of the arrest and the search incident thereto.

The state's evidence reflect that at approximately 4:30 P.M., on November 4, 1968, Officer P. R. Gonzales, a detective with the San Antonio Police, an officer with eleven years of experience, was patrolling in the vicinity of the five hundred block of Matamoros Street, a location known to him as frequented by dope addicts, he observed a parked car with the motor running. Then he noticed "a suspicious person there coming from the area of some vacant shacks."

"Q. Describe the condition of the shacks.

"A. Well, it's a — it's —

"Q. Without mentioning the contents or anything like that.

"A. It's just a vacant small houses, vacant, like rows of houses, little rooms — one-room type little apartments all together.

"Q. Were they suitable for habitation?

"A. No, sir.

"Q. Were they generally run down?

"A. Yes, sir.

"Q. And when you saw this individual outside the houses then what did you do, without saying that you said. What did you do?

"A. I stopped him and I asked for his identification, see what he was doing there, and after I talked to him, he didn't give me any. He said he didn't — he was going somewhere.

"Q. Don't go into what he said.

"A. Okay, sir.

"Q. After you had the conversation with the individual, then did you go back to your vehicle?

"A. Yes, sir. I went back to my vehicle because I noticed some suspicious persons — another party just to the — just north from where I was in the street.

"Q. What did you do when you got back in your vehicle?

"A. I called for assistance, . . ."

Officer Gonzales then testified that Officer Johnny Teran arrived in about five minutes and "We started walking towards these shacks."

"Q. Is this Matamoros Street?

"A. From Matamoros, right, the five hundred block, and there was one subject that we could see, and we started getting over there real fast, or running or walking, I don't recall; and this man yelled something, you

know. I didn't hear exactly what he said. He threw something that he had and he started running. And as soon as we got to this shack there was, we noticed, about five or six persons running in different directions.

"Q. Do you know the defendant in this case, Isaias Lara?

"A. Yes, I do."

He further testified that one of the "subjects" that ran was Isaias Lara, the appellant; that Officer Teran apprehended the appellant; that in his opinion the appellant was under the influence of narcotics. A search of appellant revealed a capsule of heroin.

Officer Teran testified that he was dispatched to the scene where he met Officer Gonzales, and as they started walking toward the houses a "lookout" yelled something and about 5 or 6 "subjects" ran from one of the abandoned houses. The officers gave chase and he (Officer Teran) caught the appellant and handcuffed him to a stop sign, quickly searched him and found a pocket knife, then ran to apprehend others. After he and Officer Gonzales returned with other "subjects" they were all read a legal warning and searched. The heroin heretofore referred to was found on appellant. Officer Teran also testified that, in his opinion, appellant was under the influence of narcotics.

The house that the appellant and his companions ran from was known to the officers as a place used by "dope addicts." Officer Teran testified on appellant's pre-trial motion to suppress evidence, that his suspicions were aroused, ". . . like I said, we have

made calls here before. We had received information from other people, reliable people that they had seen a lot of subjects, dope addicts going to that location and into the shacks and where they had gone in there and have used dope; and on previous occasions, I have gone there and we have arrested — I have arrested other subjects from this location. And while I have looked through these shacks I have seen all the evidence of the use of heroin. I have seen the burnt bottle caps. I found several empty boxes of those gelatin capsules, the boxes and the empty capsules and soda water bottles with water. On occasions I found just, I mean, old needles: all indications that they are using this location."

We hold that under all the circumstances herein observed by the officers and the facts known by them, they had probable cause to be suspicious and the arrest was authorized under Art. 14.03 V. A. C. C. P., which provides:

> "Any peace officer may arrest, without warrant, persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."

The arrest made under the provisions of Art. 14.03, supra, would authorize a search of appellant's person incident thereto and the fruits thereof were admissible in evidence. Alaniz v. State, 458 S. W. 2d 813; Baity v. State, 455 S. W. 2d 305; Carter v. State, 445 S. W. 2d 747; Sanchez v. State, 438 S. W. 2d 563; Laube v. State, 417 S. W. 288; Chambler v. State, 416 S. W. 2d 826. Appellant's complaint of the second search at the scene is without merit.

There being no reversible error, the judgment is affirmed.

Odom, Judge.

(Delivered March 17, 1971)

APPENDIX B

NO. 43,511

ISAIAS LARA, Appellant
VS.
THE STATE OF TEXAS, Appellee
APPEAL FROM BEXAR COUNTY

OPINION ON APPELLANT'S MOTION FOR REHEARING

On rehearing appellant contends we missed the point he sought to make on original submission. He points out, and correctly so, that the capsule of heroin was recovered as a result of the second search of his person. He contends that our original opinion left the impression it was recovered when he was first apprehended, and that the second search was not reasonable because it was not made contemporaneously with the arrest; that it was at another time and place.

As the original opinion reflects, the appellant was one of several men who fled from abandoned houses upon the approach of the officers. After he was apprehended by Officer Teran he was handcuffed to a stop sign. A cursory search of his person revealed a pocket knife. Officer Teran then left to attempt to apprehend the other fleeing subjects. He and Officer Gonzales each returned with another subject. The appellant and these two were placed in a patrol car and returned to the 500 block of Matamoros Street from which they had just fled. They were all given "Miranda" warnings. Both officers testified at the time the appellant, in their opinion, was under the influence of a narcotic. During the second search of ap-

pellant's person at this point a capsule of what was later shown to be heroin fell from his clothing. Officer Teran was unable, under the circumstances, to make more than a cursory search when the appellant was first apprehended, unless he had been willing to allow the other subjects to flee unapprehended. The second search was within a short distance and within a short time after the arrest and was substantially contemporaneous therewith. In our opinion the arrest, the limited search, the return of the appellant to the scene from which he fled, the warnings and subsequent search were all a part of one continuous happening. Cf. Taylor v. State, 421 S. W. 2d 403, 408, cert. den. 393 U. S. 916, 89 S. Ct. 241, 11 L. Ed. 2d 201.

We further observe that the officers made a bona fide arrest of the appellant under the provisions of Article 14.03, V. A. C. C. P.[1] Thereupon they discovered he was under the influence of a narcotic drug, a felony. See Article 725c, V.A.P.C. Under such circumstances Article 14.01, V.A.C.C.P.[2] would come into play authorizing appellant's arrest for that offense and authorizing a search incident to that arrest. The subsequent search would not necessarily be tied to Article 14.03, supra, but rather to the violation later

---

1. Article 14.03, V.A.C.C.P., provides:

"Any peace officer may arrest, without warrant, persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."

2. Article 14.01, V.A.C.C.P., provides:

"(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or an offense against the public peace.

"(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view."

discovered. See Taylor v. State, supra, at p. 407; Gutierrez v. State, 422 S. W. 2d 467; Denham v. State, 428 S. W. 2d 814. Thus another reason appears to justify the second or subsequent search.

Remaining convinced that this cause was properly disposed of on original submission, the appellant's motion for rehearing is overruled.

Onion, Presiding Judge

(Delivered May 19, 1971)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-5478

ISAIAS LARA,

Petitioner

V.

STATE OF TEXAS,

Respondent

BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

TO THE SUPREME COURT OF THE UNITED STATES:

Now comes the State of Texas, Respondent, and files its response to Petitioner's petition for Writ of Certiorari.

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas were delivered on March 17, 1971 and May 1, 1971, and are reported at 465 S.W.2d 164 (Tex. Crim. —— 1971.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C., Section 1257(3). The jurisdictional requisites would appear to be adequately set forth in

the petition although Respondent disputes Petitioner's contentions that any rights quaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Respondent feels that the questions presented in Petitioner's petition for Writ of Certiorari can be condensed into one primary question and stated as follows:

> I. Was the warrantless arrest and search of Petitioner unreasonable under the Fourth and Fourteenth amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that the state proceedings in this case violated his Fourth Amendment rights against unreasonable search and seizure made applicable to the states by the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondent in stating its view of the case will cite the record on file in the Texas Court of Criminal Appeals as (R) and the Transcript of the Record in the State Trial Court below as (S.F.)

Petitioner was convicted in the 175th Judicial District Court of Bexar County, Texas in cause no. 69-257, styled the *State of Texas v. Isaias Lara*, on the fifth day of November, 1969, for the offense of the possession of heroin in violation of Article 725(b), Vernons Penal Code. The punishment assessed Petitioner by the jury was life imprisonment, the maximum sentence provided by Statute. (R 370,381)

The record on file in the Texas Court of Criminal Appeals reflects the following facts and circumstances

surrounding the arrest and search of Petitioner on November 4, 1968 by officers of the San Antonio Police Department in the city of San Antonio, Bexar County, Texas.

At approximately 4:30 p.m. Officer P. R. Gonzales, a Detective with eleven years of experience was patroling in the vicinity of the five hundred block of Matamoros Street, a location of vacant shacks known to be frequented by dope addicts, when he observed a parked car with the motor running. No one was near the car. Officer Gonzales then noticed a suspicious person who didn't live or belong there coming from this area of vacant shacks which he described as vacant rows of houses, one room type, uninhabitable and generally run-down. Officer Gonzales stopped this person, asked him for his identification and reason for being there, and failing to obtain responsive answers to these questions, released him because he had noticed another suspicious person, believed to be a lookout, standing by some of the vacant shacks just one hundred feet north of where he was standing in the street. Officers Gonzales returned to his patrol car and radioed for help, stating he suspected narcotic activity at this location. (R. 49, 154, 155, 165, 167, 168, S.F. 93, 94, 104, 106, 107)

Officer Gonzales testified that Officer Johnny Teran arrived about five minutes later and they started walking towards the shacks on Matamoros Street. There was one subject, the lookout, that they could see and they started getting over there real fast, running or walking, when this man yelled something, threw something, and started running. As soon as they got to the shack there were about five or six persons running in different directions. Officer Gonzales further testified that one of the subjects who ran was Isaias Lara; that he has known Isaias Lara for several years and on No-

vember 4, 1968 he saw Isaisa Lara running from this vacant shack. Upon seeing the flight of this person, Officer Gonzales ran after two subjects who ran north. Officer Teran ran after the others who ran east from the vacant shack. Officer Gonzales did not personally chase the Petitioner, but Officer Teran did. Officer Gonzales apprehended one of the men he was chasing about one block away. After Officer Gonzales arrested his quarry, they walked back to the corner of Monterrey and Leona and found Isaias Lara handcuffed to a stop sign. Officer Teran was just coming back with another subject. All three subjects were handcuffed and placed in the back of a patrol car and conveyed to the five hundred block of Matamoros Street, the starting point of the chase. The police wagon was called for. The three subjects were taken out of the car, and all were given "miranda" warnings. (R 49, 50, 156, 157, 158, 182, S.F. 95, 96, 97, 121).

Officer Gonzales stated that as a police officer, he had experience observing persons under the influence of narcotics. Based upon his knowledge, observation and experience, it was his opinion on seeing Isaias Lara at the time he was handcuffed to the stop sign, and later after he was removed from the vehicle, that Isaias Lara was under the influence of narcotics. Isaias Lara's appearance was described by Officer Gonzales as being kind of like he was asleep, his eyes were falling down, like in a daze, his mouth remained open like he was going to sleep. Officer Gonzales therefore conducted a search, starting from Lara's socks and proceeding to Lara's waist and packets. The front pockets were turned inside out and upon doing so a capsule of heroin fell out on the sidewalk. Officer Gonzales picked the capsule up and showed it to Officer Teran who was right there with him. Isaias Lara was then

placed in the police wagon and subsequently booked for possession of heroin. Officer Gonzales further testified that upon a check of the premises he found evidence of narcotic activity in the shack from which Isaias Lara had run. (R 55, 160, 161, 162, S.F. 99, 100, 101)

Officer Johnny Teran testified that he was dispatched to the scene because of suspected narcotic activity and that he met Officer Gonzales and that as they started walking toward the house a "lookout" yelled something and about five or six subjects ran from one of the abandoned houses. Officer Teran gave chase, caught Isaias Lara, and handcuffed him to a stop sign. Officer Teran quickly searched him, found a pocket knife, then ran to apprehend the others. After Gonzales and Teran returned with the other subjects Isaias Lara was read a legal warning and searched. Heroin was found on Isaias Lara.

Officer Teran also testified that based upon his knowledge, observation and experience, it was his opinion and impression upon seeing Isaias Lara at the time he caught him and before he handcuffed him to the stop sign and later after he was removed from the stop sign that Isaias Lara was under the influence of narcotics. Officer Teran described Isaias Lara's appearance as being real droopy. His mouth was droopy and drooling at both sides and he was wobbling around a lot and could hardly keep his eyes open. (R 38, 39, 40, 43, 44, 204, 205, 206, 207, S. F. 142, 143, 144, 146)

Officer Teran further testified in regard to the location from which Isaias Lara had run that his suspicions were aroused, "like I said we have made calls here before. We had received information from other people, reliable people, that they had seen a lot of sub-

jects, dope addicts, going to that location and into the shacks and where they had gone in there and used dope; and on previous occasions, I have gone there and we have arrested — I have arrested other subjects from this location. And while I have looked through the shacks I have seen all the evidence of the use of heroin. I have seen burnt bottle caps. I have found empty boxes of those gelatine capsules, the boxes and the empty capsules and soda water bottles with water. On occasions I have found old needles; all indications that they are using this location." (R 45, 218, 219, S.F. 156, 157)

Based on the above particular facts and circumstances surrounding Petitioner's arrest and search, the Trial Court overruled Petitioner's Motion to Suppress Evidence and objections to the introduction of said evidence at his trial, and upon appeal, the Court of Criminal Appeals of Texas rejected Petitioner's Points of Error and affirmed the Trial Court ruling.

ARGUMENT AND AUTHORITIES

I. Was the warrantless arrest and search of Petitioner unreasonable under the Fourth and Fourteenth amendments to the United States Constitution?

The Fourth Amendment recognizes that the individual's right of privacy must at times give way to the needs of society and prohibits only "unreasonable" searches and seizures, not all searches and seizures. *Elkins v. United States* 364 U.S. 206, (1960). Therefore the ultimate test is whether under all the circumstances of the on the street encounter, Petitioner's right to personal security was violated by the search and seizure. *Terry v. Ohio* 392 U.S. 1, 9, (1968).

With the exception of "stop and frisk" situations, *Terry v. Ohio* supra., probable cause is necessary to

justify any search whether or not conducted under the authority of a warrant. The Courts have generally found probable cause for a search where there is a reasonable ground for suspicion, supported by facts and circumstances sufficiently strong in themselves to lead a reasonably cautious man to believe that a person is guilty of a particular crime, and to believe that the place to be searched contains evidence of that crime. The Courts have considered this test as a non-technical standard to be judged in the light of everyday experience, and not as an abstract legal formulation; moreover, the test is not whether the facts would cause an ordinary citizen to believe an offense had been committed but whether they would cause such a belief in the mind of a reasonable law enforcement officer in light of his training and experience. Whether there is probable cause to justify a search or seizure must be decided on the basis of the individual facts of each situation.

English and American Law has always recognized the right on the part of the arresting officers "to search the person of the accused when legally arrested, to discover and seize the fruits as evidence of crime" *Weeks v. United States* 232 U.S., 283, 392, (1914); *United States v. Pardo-Bolland* 229 F. Supp. 473 (S.D.N.Y., 1964), affirmed 348 F.2d 316, (2nd Cir. 1965), cert denied 382 U.S. 944. In such cases, seizure is not restricted to things which might be taken under a search warrant, when there is no arrest of the possessor. In the words of Judge Cardozo, "The peace officer empowered to arrest must be empowered to disarm. If he may disarm he may search lest a weapon be concealed. The search being lawful, he retains what he finds, if connected with the crime." *People v. Chiagles* 237 N.Y. 193, 197-198, 142 N.E. 583 (1923).

All items taken from Petitioner's person incident to his lawful arrest may be retained by the State and used upon the trial insofar as relevant. *Draper v. United States* 358 U.S. 307, (1959); *Warden v. Hayden* 387 U.S. 294, (1967); *Chinel v. United States* 395 U.S. 752, (1969). Furthermore a search made incidental to arrest is not reasonable unless it is made contemporaneously with the arrest, that is not remote in time or place. *Price v. United States* 348 F.2d 68, (D.C. Cir. 1965) cert. denied, 352 U.S. 888.

The question in this court is not whether the search and seizure was authorized by state law; the question is rather whether the search was reasonable under the Fourth Amendment to the United States Constitution. *Sifron v. New York* 392 U.S. 40, 61, (1967). Petetioner does not attack the constitutionality of Article 14.03, Vernons Code of Criminal Procedure.[1] Respondent disputes Petitioner's characterization of Article 14.03, Vernons Code of Criminal Procedure as nothing more than the Texas "stop and frisk" law. The provision clearly authorizes a lawful arrest without a warrant, and search incident to the arrest, based upon circumstantial facts as contrasted with Article 14.01, Vernons Code of Criminal Procedure, which authorizes an arrest without a warrant when the offense is committed in the officer's presence or within his view.[2]

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[1]Article 14.03, V.C.C.P., provides:

"Any peace officer may arrest, without warrant, persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."

[2]Article 14.01, V.C.C.P., provides:

"(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in

Baity v. State, 455 S.W.2d 305, (Tex. Crim. 1970).

The Texas Court of Criminal Appeals recently recognized in *Baity v. State* supra, that circumstances short of probable cause for an arrest may justify temporary detention for investigation and questioning as recognized in *Terry v. Ohio*, supra. If a stop and frisk gives rise to probable cause to believe that the suspect has committed a crime, or is presently committing a crime in view of the officer, Texas law empowers the officer to make a formal arrest without a warrant and a full incident search of the person. Art. 14.03, 14.01, V.C.C.P., supra.

The situation presented by the facts and circumstances set forward in Respondent's Statement of the Case is clearly the classic situation of an on the street encounter, necessitating the swift action on the part of the officer, which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. The officer's conduct in this case, as in *Terry v. Ohio,* supra., must be tested by the Fourth Amendment's general proscription against unreasonable search and seizure.

The officers, Gonzales and Teran, were experienced and well trained police officers; both had previous knowledge of a particular area of old vacant shacks being used as a "shooting gallery." They had reliable complaints from citizens living in the neighborhood that unlawful activities were occurring at this location. Officer Gonzales noticed two suspicious persons near the area and a car unattended with its motor running.

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his presence or within his view, if the offense is one classed as a felony or an offense against the public peace.

"(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view."

Upon inquiry of one of the suspicious persons, Officer Gonzales was unable to obtain responsive answers to his questions but because he observed the other person standing near the vacant shacks he chose to let the first man go and to request the help of another officer specifically stating that he suspected narcotic activity. The other person, suspicioned to be a lookout, in fact turned out to be a lookcut, and after he warned the occupants of one of the shacks, five or six persons were subsequently seen running from the shack. Isaias Lara was recognized by both officers as having run out of one of the shacks. Officer Teran apprehended and arrested Petitioner within a block of Matamoros Street and testified that prior to handcuffing Petitioner to a stop sign and conducting a search for weapons he observed that Petitioner appeared to be under the influence of narcotics because of his droopy mouth, eyes, and physical exhaustion. Officer Gonzales, prior to the second search, observed Petitioner's appearance and testified that in his opinion Petitioner was under the influence of narcotics, a felony offense in Texas under Article 725(c) V.P.C. A search of the premises from which Petitioner fled revealed further evidence of narcotic activity. As stated in the Peters' case, 392 U.S. 40, 66, (1904), and equally applicable to the facts presented above, "it is difficult to conceive of stronger grounds for an arrest short of actual eye-witness observation of criminal activity."

It is therefore Respondent's position that when Officer Teran handcuffed Petitioner to the stop sign he had probable cause to believe that Petitioner was engaged in criminal activities, that at this point, he had the authority to search Petitioner, and the incident search was obviously justified by the need to seize weapons which might be used to assault the officer or

effect an escape, as well as by the need to prevent the destruction of evidence of the crim . *Preston v. United States* 376 U.S. 364, 367, (1964). As pointed out by the Texas Court of Criminal Appeals in its opinion on Appellant's Motion for Rehearing,

> "Officer Teran was unable, under the circumstances to make more than a cursory search when the Appellant was first apprehended, unless he had been willing to allow the other subjects to flee unapprehended. The second search was within a short distance and within a short time after the arrest and was substantially contemporaneous therewith. In our opinion the arrest, the limited search, the return of the Appellant to the scene from which he fled, the warnings and subsequent search were all a part of one continuous happening. Cf. *Taylor v. State*, 421 S.W.2d 403, 408, cert. den. 393 U.S. 916, 89 S.Ct. 241, 11 L.Ed. 2d 201."

The Court of Criminal Appeals went on to hold that:

> the officers made a bona fide arrest of the Appellant under the provisions of Article 14.03, V.A.C.C.P.[1] Thereupon they discovered he was under the influence of a narcotic drug, a felony. See Article 725(c), V.A.P.C. Under such circumstances Article 14.01, V.A.C.C.P.[2] would come into play authorizing Appellant's arrest for that offense and authorizing a search incident to that arrest. The subsequent search would not necessarily be tied to Article 14.03, supra., but rather to the violation later discovered. See *Taylor v. State*, supra., at p. 407; *Gutierrez v. State*, 422 S.W.2d 467; *Denham v. State*, 428 S.W. 2d 814. Thus another reason appears to justify the second or subsequent search."

Accordingly, under the above authorities and argument the seizure of heroin from Petitioner should be upheld as a product of a legal arrest without warrant and a reasonable search incident to a lawful arrest.

CONCLUSION

In light of the foregoing circumstances and for the reasons advanced above, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert C. Flowers, Assistant Attorney General of Texas, Attorney for Respondent, certify that a copy of the foregoing Respondent's Brief and Opposition has been served on Petitioner by placing same in the United States Mail, postage prepaid to Petitioner's Attorney, Mr. Harry A. Nash, Jr., 1925 Tower Life Building, San Antonio, Texas 78205, Mr. Theo P. Henly, 1203 Tower Life Building, San Antonio, Texas 78205 this the _____ day of November, 1971.

Assistant Attorney General